

**COURT OF COMMON PLEAS
FOR THE STATE OF DELAWARE**

WILMINGTON, DELAWARE 19801

John K. Welch
Judge

February 3, 2011

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Re: *Cushing Custom Homes, Inc. v. Isabel S. Pearce, et al.*
C.A. No.: CPU4-09-007913
Defendant's Motion for Reargument
Court of Common Pleas Civil Rule 59(e)

Date Submitted:
Date Decided: February 3, 2011

LETTER OPINION

Dear Counsel:

Defendant Isabel S. Pearce (“defendant”) has filed a Motion for Reargument (“Motion”) pursuant to *Court of Common Pleas Civil Rule 59(e)* on or about January 5, 2011. Plaintiff, Cushing Custom Homes, Inc. (“plaintiff”) filed a response to Defendant’s Motion on January 20, 2011. The matter is ripe for decision and the Court finds oral argument is not necessary.

Plaintiff correctly points out in its Response that *Court of CCP Civ.R. 59(e)* requires that ... “A Motion for Reargument shall be served and filed within 5 days after the filing of the Court’s opinion or decision.” The Court notes that issued its Final Opinion and Order on December 20, 2010 and defendant’s Motion was signed on January 3, 2011 and filed on January 5, 2011 with the Civil Clerk. The motion therefore exceeds, as plaintiff points out “by far, the 5 day time period permitted” by *CCP Civ.R. 59(e)* which requires that the Motion be “served and

filed within 5 days after the filing of the Court's opinion or decision." Although the Motion appears to be time barred, in the interest of justice, the Court shall address the merits of defendant's Motion.

I. The Merits of Defendant's Motion

The Court notes that *CCP Civ.R. 59(e)* requires that "the Motion shall briefly and distinctly state the grounds therefore." While defendant's motion is approximately four and a half pages long, defendant does not set forth point headings for each legal argument, nor does defendant set forth the exact prayer for relief for her various legal arguments as a result of the filing of the Motion. The Court shall, however, address what appear to be defendant's legal arguments as they were presented in her motion.

First, defendant asserts that due to an issue with the Courts electronic filing system, defendant's Response to Plaintiff's Request for Admissions should not be deemed admitted due to the late filing of the pleading. Defendant therefore asserts by attaching the filing of the receipt as Exhibit "A" to her response that it is clear that defendant's response to the Request for Admission was served on the plaintiff.

Second, it appears defendant asserts that at the Motion hearing in this Court on November 19, 2010 plaintiff was unable to respond in Court to the defendant's Summary Judgment Response because plaintiff's counsel had not received it from the Court's electronic filing system. The Court therefore reserved decision on Plaintiff's Motion for Summary Judgment in order that plaintiff could file a written reply which was received by the Court on or about November 29, 2010. What defendant apparently asserts in argument no. 2 is that he filed a sworn affidavit which would arguably constitute facts to rebut Plaintiff's Motion for Summary Judgment.

Third, defendant asserts that the Court ignored defendant's counter-claim against plaintiff for breach of the agreement and the resulting monetary damages and since plaintiff did not formally request or ask for Summary Judgment in her Motion as to defendant's counter-claim, it should not have been granted. Defendant asserts there is "no mention of the counter-claim in [plaintiff's] Motion for Summary Judgment."

Finally, defendant asserts that plaintiff never responded to Defendant's Motion to Extend the Time to respond to plaintiff's Request for Admissions as well as the Court also did not rule on defendant's motion to Extend. Defendant did not assert that he ever filed a motion on for the Friday Court of Common Pleas Civil Motion Calendar or notice the same to plaintiff's counsel absent his filing with her Summary Judgment response.

II. Plaintiff's Answer to Defendant's Motion

Plaintiff has formally responded to Defendant's Motion in paragraph 3 of its response and asserted that plaintiff's copy of defendant's Response to the Motion for Summary Judgment did not, in fact, include the alleged affidavit of Isabel Pearce. In paragraph 4 of plaintiff's response, plaintiff asserts that following the return from the Court she had misplaced the response and requested a facsimile copy from defendant. According to plaintiff's counsel, defendant's affidavit of Ms. Pearce was not included in the facsimile and "[d]id not surface until defendants filed its response to plaintiff's Motion for Summary Judgment on December 6, 2010. Plaintiff also restates argument two of its objection to a Motion to Strike Defendant's Response to Motion for Summary Judgment. In paragraph 12 of her motion, plaintiff asserts that the Court, in its formal opinion, recognized that no evidence to further the allegations in defendant's counter-claim had been supplied by the defendant to the plaintiff and no affidavit was attached to its Response for a Motion for Summary Judgment.

III. The Legal Standard

“The law is well settled that a Motion for Reargument is the proper device for seeking reconsideration by the trial court of its Findings of Fact, Conclusions of Law or a judgment after a bench trial.” *See, e.g. Hessler, Inc. v Farrell*, 260 A.2d 701 (Del.Supr.)(1969). “A Rule 59(e) Motion is within the sound discretion of the Court.” *Brown v. Weiler*, 719 A.2d 489 (Del.Supr.)(1998); *See also, Orzocowski v. Sherman*, 1998 Del.C.P.Lexis 16, C.A. No. 97-03-106 (Sept. 8, 1998), Welch, J.

IV. Findings and Order

With regards to argument one dealing with a Request for Admissions, the Court cannot find in the docket that defendant formally noticed a Motion for Time to Extend the Request for Admissions or served it on plaintiff’s counsel or notice for the Friday Civil Motions Calendar. Nor does he attach any such Friday filing, or assert any such filing was made with the Court. The Court does find, however, that it was untimely filed with the Court and is **DENIED**. The Court therefore **DENIES** reargument on this point.

Second, plaintiff’s counsel correctly pointed out that the affidavit of Isabel Pearce was not included in the facsimile to plaintiff’s counsel and did not surface in the record until defendant filed its Response for Plaintiff’s Motion for Summary Judgment on December 6, 2010. At page thirteen (13) of this Court’s Opinion, the Court noted that defendant untimely submitted an “Amended” Response to Plaintiff’s Motion for Summary Judgment including an affidavit only after plaintiff raised the argument in its Response to Defendant’s Response to Plaintiff’s Motion for Summary Judgment. Based upon the legal standard set forth in CCP. Civ.R. 56(c) and the record, the Court declines to alter or amend its final decision. These facts give the Court

no reason to revisit it's formal written opinion and Findings of Fact and Conclusions of Law that Summary Judgment should have been granted in plaintiff's favor under *CCP Civ. R. 56(c)*.

Third, with regards to defendant's argument that plaintiff never moved for Summary Judgment as to defendant's counter-claim, the Court agrees, after a review of the pleadings, it is clear plaintiff never moved for Summary Judgment as to defendant's counter-claim and **GRANTS** reargument in defendant's favor in this issue. Fair notice pleading requires plaintiff to place defendant on notice for summary judgment in her counter-claim.

Fourth, with regards to defendant's argument as to the Motion to Extend the Time to Respond to Plaintiff's Request for Admission, reargument is therefore **DENIED**.

Fifth, Plaintiff's pending Motion to Strike is moot.

IT IS SO ORDERED this 3rd day of February, 2011.

John K. Welch
Judge

/jb

cc: Ms. Tamu White, Civil Case Manager
CCP, Civil Division